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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 57

GENERAL ELECTRIC COMPANY AND
CARBOLOY COMPANY, INC.,
Petitioners,

vs.

THE MARVEL RARE METALS COMPANY,
THE OHIO INSTRUMENT MANUFACTURING COMPANY,
CHARLES L. GEBAUER AND C. F. W. BATES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE MARVEL RARE METALS COMPANY,
THE OHIO INSTRUMENT MANUFACTURING COMPANY,
CHARLES L. GEBAUER AND CHAS. F. W. BATES,
By HAROLD ELNO SMITH,
Hanna Bldg., Cleveland, Ohio,
Counsel for Respondents.

Cleveland, Ohio,
May 14, 1932.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. STATEMENT OF THE CASE.

General Electric Company and Carboloy Company, petitioners (hereinafter sometimes denominated "plaintiffs"), being corporations and residents of New York, filed suit for patent infringement against respondents (hereinafter sometimes denominated "defendants") at Cleveland, Ohio. Defendants' answer asserted a counterclaim for patent infringement coupled with a suggestion of interfering patents (Tr. pp. 10-13). The District Court at plaintiffs' motion dismissed the counterclaim, apparently on the theory that the plaintiffs had no regular and established place of business within the jurisdiction, although the District Court gave no reasons and filed no opinion. (Tr. pp. 15-18.) Since the counterclaim contained a prayer for injunction which was effectually denied by its dismissal, defendants took in-

terlocutory appeal to the Circuit Court of Appeals for the Sixth Circuit within thirty days, in strict accordance with Judicial Code, Sec. 129, (Tr. pp. 29-33), and also applied for Writ of Prohibition to prevent trial of the Bill until the Appeal should have been decided. Plaintiffs moved to dismiss the appeal upon the technical ground that (despite the counterclaim containing a prayer for an injunction) its dismissal was not appealable "until after the entry of the final decree in the case." (Tr. pp. 39-40.) The Circuit Court of Appeals thereupon both denied the plaintiffs' motion to dismiss and reversed the action of the District Court in explicit reliance upon the decision of this Court in *Leman et al. vs. Krentler-Arnold Hinge Last Co.* (No. 332, this term, decided Feb. 15, 1932) and also dismissed the Writ of Prohibition (Tr. pp. 41-2) which was no longer necessary.

II. POINTS.

(1) While the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Naivette Inc. vs. Philad Co.*, 54 F. (2nd) 623, is undoubtedly in conflict with that of the Circuit Court of Appeals fo the Second Circuit in the cases of *Radio Corp. vs. J. H. Bunnell & Co.*, 298 Fed. 62, and *Allied Metal Stamping Co. Inc. vs. Standard Electric Equipment Corp.*, 55 F. (2nd) 221, this conflict concerns only a preliminary and procedural point in the instant case, which has now become entirely moot and not sufficient to warrant a writ of certiorari, seeing that no substantive injustice has been done or threatened.

(2) This petition is premature since the order required by the mandate is not a final decree and there has been no trial nor even an answer filed to the defendants' counterclaim.

(3) While the Supreme Court undoubtedly has the right to issue its Writ of Certiorari at any time, it is rarely

done under interlocutory conditions, where no substantive injustice has been either done or threatened, and merely because of a conflict of decisions in other courts in respect of matters of mere procedure.

III. RESPONDENTS' ARGUMENT.

(4) Substantive justice has been done since the decision of the Circuit Court of Appeals was in exact accordance with the decision of this Court in the *Leman* case first referred to.

(5) Petitioners' sole question concerns a moot point of procedure; moot because merged in the decision of the Appellate Court that the District Court's decision was wrong, and procedural, merely, because the petitioners' sole ground is that the Appellate Court did justice *too promptly*, viz.:

> "the order of the District Court dismissing the counterclaim filed by the defendants in the court below, is not appealable until after the entry of the final decree in the case." (Tr. pp. 70-1.)

(6) The Appellate Court, by a single act,

(a) denied the plaintiffs' motion to dismiss the appeal; and

(b) reversed the District Court in accordance with an exact precedent of this Court.

Petitioners, hence, complain:

(a) That the Appellate Court, knowing that the respondents were right and the District Court in error according to the established holding of the Supreme Court, ought nevertheless to have denied them the privilege of having the District Court's error corrected by an interlocutory decree pursuant to Sec. 129 of the Judicial Code, and compelled them to go through an expensive, footless trial under adverse conditions.

(b) That the precedent of this Court set forth in the *Leman* case is wrong and that Equity Rule 30 is

in conflict with statute and, therefore, void. This mere statement of the petitioners' position shows how indefensible it is.

(7) This petition is premature since the decision complained of is merely interlocutory. It is, of course, quite permissible and proper for the Supreme Court, if its conscience shall so direct, to depart from its established practice of allowing certiorari only from final decrees, and in cases where it seems clear that injustice has been done. Here, however, is no injustice; there has been no trial at all. The evidence may prove the absence of any substantial rights in anybody. Even if there were any unsettled question of law between Equity Rule 30 and 28 U. S. Code 109 as petitioners aver (although respondents understand this to have been settled by the *Leman* decision), this infant case would not seem to constitute an expedient occasion for settling a question of such grave moment; and certainly it does not seem fitting that the wheels of justice should be commanded to stand still under these incomplete conditions merely to inquire whether the Circuit Court of Appeals of the Sixth Circuit was right in affording the respondents the immediate benefit of the *Leman* case or whether it ought to have denied justice until after final decree in accordance with the procedure alleged to be current in the Second Circuit. Unless the Supreme Court can see present injustice in the instant case it would seem unnecessary to place on these unwealthy defendants the burden of any moot litigation.

Wherefore the respondents respectfully submit that the petition for Writ of Certiorari should be dismissed.

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